

DATE: July 9, 1999

TO: Office of Water Programs Staff

THROUGH: E. H. Bartsch, P.E., Director, Office of Water Programs

THROUGH: Allen R. Hammer, P.E., Director, Division of Water Supply Engineering

FROM: Robert A. K. Payne, Esq., Chief of Compliance & Enforcement

SUBJECT: Water- Procedure - Notice of Violation Format/Definitional Changes

Revision to Attachment B of Appendix 210-6 of WM 659

The Office of the Attorney General is concerned that some of our Notices of Violations (NOVs) are reading more like case decisions. Section 9-6.14:4 of the Code of Virginia defines a case decision as including any agency determination that the named party is or is not, may or may not be in violation of a law or regulation. This means that any written notice that informs a citizen that he is or is not, may or may not be in violation of one of the Health Department's regulations clearly constitutes a case decision. For example, a NOV that states, "This notice is to inform you that your waterworks is in violation of acceptable operating practices as stated by the regulations," is a case decision.

Agencies do not have the authority to make factual determinations or findings without involvement of the regulated party via notice and an opportunity to be heard in the absence of a written waiver. In other words, the law does not give us the discretion to make factual findings without due process. Rather Section 9.6.14:11 of the Code of Virginia provides that an agency "shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or consultation to go directly to a formal hearing." Agencies can only make factual findings through the informal or formal hearing mechanisms unless there is an express waiver.

To ensure that our NOVs remain consistent and do not constitute case decisions, the following format is prescribed. The NOV shall:

1. State what the OWP staff has observed.
2. State what the applicable regulations provide.

3. Inform the regulated party of apparent violations using language like:
  - a) “It appears you may have violated the regulations.”
  - b) “We believe based on the foregoing that you may have violated the regulations.”
  - c) “The letter serves to notify you of alleged violations.”
4. Request that the party take corrective action within a specified period of time.

If there is any doubt as to whether or not a NOV complies with these guidelines, please forward a copy to the Chief of Compliance & Enforcement for review.

#### **Additional Authority**

- **12 VAC 5-590-60** provides that the APA and 32.1 of the Code govern the Waterworks Regulations.
- **32.1-24** provides that the APA “shall govern the procedures for rendering all case decisions as defined in Section 9-6.14:4, and issuing all orders and regulations....”
- **Greenwald Cassell v. Department of Commerce, 421 S.E. 2d 903 (Va App. 1992)**  
The case basically holds: An informal conference must be held to make factual findings and to dictate a course of corrective action.

Additionally, the definition of State Issued Formal Notice of Violation found on page three, Attachment B of Appendix 210-6 of WM 659 shall be modified as follows:

**A formal notification to a public water system that it ~~is in violation of~~ may have violated a drinking water regulation, that the PWS must take some action to rectify its problem (e.g., disinfect, give public notification, take samples correctly, report results), and that formal legal action may follow if the specified actions are not taken. An NOV may specify dates by which actions should be taken.**